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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	PR Docket No. 94-105

REPLY OF AIRTOUCH COMMUNICATIONS IN OPPOSITION TO CPUC PETITION TO RATE REGULATE CALIFORNIA CELLULAR SERVICE

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SUMMARY

The California Public Utilities Commission ("CPUC") has predicated its case for continued regulatory authority principally on the duopoly market structure. Congress and this Commission have now eliminated that alleged impediment to competition, thus rendering the CPUC's claims moot. Moreover, the CPUC's analysis allegedly supporting its plea for continued and augmented regulatory authority is at odds with the actual evidence of market conditions submitted in this proceeding and the most recent findings of this Commission regarding competition in the wireless marketplace. Since the California market is even more competitive that other states, as demonstrated by Nextel's launch, there is no justification to authorize continued regulation here when the rest of the nation is preempted.

The few proponents of continued regulation, principally competitors of the cellular service providers seeking to preserve their protected status under the CPUC's regime, add nothing to bolster the CPUC's inadequate showing. In fact, they submitted no evidence in support of their cause for continued regulatory protection. Accordingly, their conclusory allegations should be disregarded.

Indeed, there is no evidence that the CPUC, or any other party, can present to correct the substantive and procedural flaws of the Petition. The CPUC's failure to include the required specification on the scope of the proposed regulation, the improper reliance on confidential data and improper adoption

of an entirely new form of rate regulation warrant immediate dismissal of the Petition.

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Pursuant to Section 20.13 of the Commission's Rules and its Second Report and Order, 9 FCC Rcd 1411 (1994), AirTouch Communications hereby submits its reply comments regarding the initial comments submitted by various parties in the above-captioned proceeding.

I. INTRODUCTION.

The evidentiary record in this proceeding overwhelmingly demonstrates that the California Public Utilities Commission ("CPUC") has not shown that "market conditions" for cellular service in California "fail to protect subscribers adequately" from unjust, unreasonable or discriminatory rates.[1] To the

1 See Section 332(c)(3) of the Communications Act of 1934, as amended.

contrary, the undisputed evidence demonstrates that California's market conditions and favorable demographics have created a competitive environment attracting more wireless competitors than any other state.

Unable to refute this evidence, the CPUC predicated its Petition to Retain State Regulatory Authority Over Intrastate Cellular Service Rates ("Petition") on "findings" typical of cellular markets nationwide which were the natural consequences of the historical cellular duopoly. These "findings" do not establish unique market conditions supporting a special variance from the clear federal policy that the wireless services markets develop unimpeded by state rate regulation. Even if these "findings" were unique to California, the record evidence demonstrates that the CPUC's analysis is based on a number of central factual and economic mistakes which nullify its conclusions. Moreover, the CPUC's analysis of competition in the marketplace is at odds with this Commission's recent conclusions.

The limited comments filed in support of the Petition were filed primarily by competitors of cellular service providers seeking to preserve their protected status under the CPUC's regulation and to ensure that cellular carriers will be the only competitors constrained by regulation. These comments do not remedy the fundamental inadequacy of the Petition. In fact, these proponents of restrictive regulation provide no evidence

whatsoever[2] in support of their cause and merely "parrot" the CPUC's faulty conclusions. Both the CPUC and its limited supporters have failed to understand the nature of competition in a duopoly market, and they make similar erroneous assumptions about competition in the new unrestricted wireless marketplace. That fundamental lack of understanding has led the CPUC to select forms of regulation that constrain rather than encourage competition. The proponents of continued regulation would have the CPUC continue on this misguided path which is costing California subscribers almost $250 million annually.

Even regardless of the evidence presented, the CPUC cannot correct the Petition's many deficiencies. The failure to include the required specification on the nature and scope of existing state regulation, the improper reliance on confidential data, and the improper adoption of an entirely new form of rate regulation mandate dismissal of the Petition.

II. THE PROPONENTS OF REGULATION FAILED TO SUBMIT ANY EVIDENCE SUPPORTING THEIR CLAIMS.

The few comments filed in support of the Petition were submitted principally by the competitors of facilities-based cellular service providers.[3] The cellular resellers and agents

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2 Any "new" evidence submitted by the CPUC or other party in reply comments, that was available at the time the Petition and initial comments were filed, should be disregarded as an improper attempt to "sandbag" the opponents of the Petition by denying them an opportunity to address such "evidence" in these reply comments.

3 See Comments of the National Cellular Resellers Association ("NCRA Comments"); Comments of the Cellular Resellers

(continued...)

submitted comments aimed at preserving the CPUC's misguided efforts to protect inefficient competitors.[4] Alternative wireless service providers, such as Nextel, submitted comments to ensure that only cellular carriers would remain subject to restrictive rate regulation.[5] These comments contain conclusory allegations, rather than evidence and supporting analysis, and thus should be disregarded.[6]

In fact, there simply is no evidence that would support the sweeping assertions made in these comments. The comments ignore true market conditions at both the wholesale and retail level. With regard to wholesale competition, these competitors reiterate the CPUC's fundamental analytical error by relying solely on the historical duopoly market structure as the cause

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3(...continued)
Association, Inc., Cellular Service Inc. and Comtech Inc. ("CRA Comments"); CATA Statement Supporting the Petition of the California Public Utilities Commission ("CATA Statement"); Comments of Nextel Communications, Inc. ("Nextel Comments").

4 CATA Statement at 3-4; CRA Comments at 2-3; NCRA Comments at 1-2.

5 Comments of Nextel Communications, Inc. at 8-10. Other wireless service providers submitted filings that did not necessarily advocate regulation of cellular service, but sought to ensure that noncellular entities would not be regulated. See Comments of Paging Network, Inc.; Comments of EF Johnson Company; Comments of Mobile Telecommunication Technologies, Inc.

6 The Commission indicated that interested parties would be allowed to file comments to the Petition based on "evidence." In the Matter of Implementation of Section 3(a) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1504 (1994) (hereinafter, "Second Report and Order").

of allegedly inadequate competition.[7] They refuse to acknowledge that California markets have exhibited the characteristics of intense competition in a concentrated market and are consistent with benchmark cellular markets in other states. These parties also fail to grasp the fact that the historical duopoly market structure was well known to Congress when it determined that preemption of state regulation was warranted.

Moreover, they refuse to concede that the alleged barrier to competition, the duopoly market structure, has been eradicated by the entrance of new competitors providing ESMR and PCS service. Neither the CPUC, nor any other party, can dispute that ESMR competition has arrived in California. As Nextel's chairman recently stated: "[W]e selected California as our launch site because this state is in the forefront of adopting the latest in wireless communications technology, and it is perhaps the most competitive market in the country."[8]

With regard to retail competition, the resellers and agents rely on an obsolete view of the retail marketplace which fails to acknowledge the increasing competition offered by new distribution channels. The resellers and agents complain about loosing market share,[9] particularly to mass retailers, without

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7 CRA Comments at 2-3, NCRA Comments at 3, Nextel Comments at 12-13. As one paging provider comments, "Without question, the duopoly arrangement . . . is the core of the CPUC's filing." Comments of Mobile Telecommunication Technologies Corp. at 5.

8 Statement of Morgan O'Brien, Business Wire, September 22, 1994.

9 The Cellular Agents Trade Association ("CATA") and the Cellular Resellers Association ("CRA") make unsupported vague (continued...)

acknowledging that these new competitors are merely responding to consumer demand and doing so in a more efficient manner than traditional distribution channels.[10] In essence, the resellers and agents seek to preserve the CPUC's protection of inefficient operations, so that they remain insulated from true competition.

These competitors also complain about clear evidence of price competition between the cellular carriers. For example, CATA criticizes the carriers' use of promotions.[11] It is undisputed that these discount plans and programs reflect aggressive competition between the carriers and offer consumers lower prices.[12] CATA would have the cellular carriers cease offering programs which clearly benefit the public, merely to protect ineffective competitors.[13]

9(...continued)
allegations regarding anticompetitive conduct by the cellular carriers. The FCC required that petitioning states submitting statements regarding anticompetitive conduct must provide support in the form of specific allegations of fact in an affidavit signed by a person with personal knowledge of the alleged act. Second Report and Order at 1504-05. CATA and CRA have failed to make such a showing and their unfounded allegations must be disregarded.

10 CRA Comments at 2-3; CATA Statement at 4.

11 CATA Statement at 4.

12 See Opposition of AirTouch Communications to CPUC Petition to Rate Regulate California Cellular Service ("AirTouch Opposition") at 48-50; CPUC Petition at 50.

13 CATA also asserts, without support, that the carriers have not responded to the needs of the elderly and the handicapped, despite undisputed evidence that the cellular carriers have offered discount plans which meet the needs of these customer segments. AirTouch Opposition at Appx. J; Opposition of Bay Area Cellular Telephone Company ("BACTC Opposition") at 18-19, Appxs. C, E.

Comments were additionally filed by Utility Consumers' Action Network ("UCAN") and Towards Utility Rate Normalization ("TURN"). UCAN and TURN claim that rates for cellular service in California are too high.[14] They acknowledge that the demand for cellular service in California is "very high," but do not explain the continued growth in light of the allegedly high prices.[15] UCAN and TURN also follow the CPUC's lead in mischaracterizing the cellular carriers' promotional offerings in order to undercut this clear evidence of price competition.[16] As demonstrated in the evidence submitted by the cellular carriers, the discount plans and promotional offerings provide customers with reduced rates for cellular service during the term of the customers' contract with the carrier.[17] No

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14 Comments of UCAN and TURN in support of Petition of the State of California and Public Utilities Commission to retain State regulatory Authority over Intrastate Cellular Service Rates ("UCAN") at 2.

UCAN and TURN provide no evidence to support their claim that rates are too high. They resort to assertions that they "believe" there are an increasing number of newspaper articles regarding high cellular rates. UCAN at 4. They also speculate that a comparison of churn rates among states "will likely" show that churn rates in California are higher. These unsupported and irrelevant claims must be disregarded.

15 UCAN at 2.

16 Id. at 2-3.

17 AirTouch Opposition at 49; Response of Bakersfield Cellular Telephone Company to Petition by the California Public Utilities Commission to Retain State Regulatory Authority Over Intrastate Cellular Rates ("Bakersfield Response") at 9-10; Response of the Cellular Carriers Association of California Opposing the Petition of the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Intrastate Cellular Service Rates ("CCAC Response") at 65-68, Tab A at 12-15, Table 5, Tab B (Charts G-J); Comment of GTE Service

(continued...)

matter what characterization they apply, it is undisputed that the customer is paying a lower rate for cellular service.

The National Cellular Resellers Association ("NCRA") similarly fails to provide any evidence or analysis supporting its claims. Indeed, NCRA simply lumps together all of the states' petitions and urges their adoption, without any comment on the merits of the individual petitions or the market conditions within each state.[18] The inappropriateness of such comments is clear, as even Nextel recognizes that "the contents and detail of the various petitions vary substantially."[19]

NCRA attempts to support its sweeping claims regarding a lack of competition in the cellular industry with reference to "federal reports." The majority of these "reports" were issued prior to the Congressional mandate for preemption of state regulation, and thus their findings are irrelevant.[20] As to the one FCC decision issued recently, NCRA has mischaracterized the findings. Contrary to NCRA's claim, the FCC's Second Report

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17(...continued)
Corporation in Opposition to the Petition of California Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service Within the State of California ("GTE Comment") at 31-36, Attach. A at 6-7, Attach. B; Response by Los Angeles Cellular Telephone Company to Petition by the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Intrastate Cellular Service Rates ("LACTC Response") at 10, 16-23, 31; Opposition of McCaw Cellular Communications, Inc. ("McCaw Opposition") at 38-40.

18 NCRA Comments at 6.

19 Nextel Comments at 7.

20 See Attachment to NCRA Comments, "Federal Reports Supporting a Lack of Competition," Items 4 through 8.

and Order on the regulatory treatment of mobile services does not conclude that the cellular services market is uncompetitive. Indeed, the FCC states that "[t]he Commission has in the past found . . . that cellular providers face sufficient competition and that it therefore is in the public interest to relax some of the Commission policies traditionally applied to non-competitive markets."[21] The Commission only found, at the time, that there was insufficient evidence that the marketplace was fully competitive.[22] NCRA also cites to the Commission's plans to initiate a monitoring plan applicable to cellular. However, this plan is predicated on the FCC's conclusion that the current state of competition in cellular does not preclude its exercise of forbearance authority.[23] Any monitoring plan will serve to ensure that the forbearance action the Commission is taking with respect to the cellular industry does not adversely affect the public interest.[24]

In a similarly misleading fashion, NCRA relies on a single line from the comments of the Department of Justice in connection with AT&T's motion for a waiver of section 1(D) of the Modified Final Judgment in connection with its acquisition of

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21 Second Report and Order at 1470.

22 Id. The Commission had previously declined NCRA's suggestion to institute a broad inquiry into the state of cellular competition and state regulation of cellular. See Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1724 (1991).

23 Id. at 1467-1468.

24 Id. at 1468.

McCaw.[25] Importantly, however, NCRA completely ignores the findings of this Commission regarding cellular competition made in connection with that transaction:

- "[T]he existence of two facilities-based carriers has created a degree of rivalry not present in the "wireline" exchange services under the former Bell system, and competition from other wireless systems, such as PCS, is on its way.[26]

- "[W]e are taking steps to make wireless telecommunications in this country even more competitive. We anticipate that the advent of PCS will open the commercial mobile radio services ("CMRS") marketplace, which includes cellular service, to intense competition."[27]

- "[T]he wireless communications business is one in which relatively small, entrepreneurial competitors have often been as successful as large ones such as the BOCs."[28]

In light of the recent findings by this Commission, NCRA's selected references cannot be the lawful basis for a conclusion that the California cellular industry is insufficiently competitive.

Further, NCRA's arguments are inconsistent with the broad-based, highly competitive nature of the commercial mobile radio services ("CMRS") marketplace. The competitive characteristics

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25 NCRA also relies on a filing by the Department of Justice ("DOJ") in connection with the Bell Companies motion for a generic wireless waiver. AirTouch has submitted the affidavit of Dr. Jerry Hausman which discusses in detail the errors of DOJ's analysis. See AirTouch Opposition, Appx. E.

26 In re Applications of Craig O. McCaw and AT&T, (FCC 94-238), adopted Sept. 19, 1994; released Sept. 19, 1994 (hereinafter, "In re Applications of Craig O. McCaw and AT&T") at ¶39.

27 Id. at ¶40 (footnotes omitted).

28 Id. at ¶38.

of this industry, as well as the fact that cellular carriers compete not only with other cellular carriers but also with other CMRS providers, was recently recognized by the Commission.[29] As a result of a careful analysis of the demand and supply characteristics of the CMRS marketplace, the Commission has concluded that

> "our analysis of actual and potential competition supports our conclusion that all commercial mobile radio services are substantially similar for purposes of devising technical and operational rules. * * * [A]ctual competition among certain CMRS services exists already and, more importantly, the potential for competition among all CMRS services appears likely to increase over time due to expanding consumer demand and technological innovation."[30]

In finding that "[g]rowth and competition are the defining features of the wireless marketplace,"[31] the Commission noted that, for example, "paging and cellular companies perceive themselves as competing for the same customers"[32] and that, although some might argue that traditional interconnected dispatch services do not compete with cellular carriers, "[w]e do not subscribe to such a balkanized view of the CMRS marketplace. Such a narrow conception does not comport with the realities of the marketplace, does not advance our objectives

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29 Third Report and Order (GN Docket No. 93-252 et al.) FCC 94-212, adopted August 9, 1994; released September 23, 1994.

30 Id. at ¶27 (emphasis added); see also ¶43 ("we determine that our policy goals and our understanding of the dynamic nature of the CMRS marketplace lead us to the conclusion that all commercial mobile radio services compete with one another, or have the potential to compete with one another, to meet the needs of consumers to communicate while on the move.")

31 Id. at ¶53.

32 Id. at ¶60.

under the Communications Act, and, we believe, is not consistent with antitrust principles."[33] As a result, in making its decision regarding the CPUC's Petition, the Commission must reject as too narrow the view offered by NCRA and the CPUC of the competitive market faced by cellular carriers.[34] Instead, the Commission should once again recognize the dynamic, competitive nature of the CMRS industry when it evaluates and rejects the CPUC's Petition.

The only California governmental agency filing comments supporting the Petition was the County of Los Angeles ("County").[35] The County asserts that it "has experienced first-hand the monopolistic practices of the facilities-based carriers that serve Los Angeles"[36] which warrant continued regulation.[37] The Commission should be aware of exactly what alleged "monopolistic practices" the County has endured. The County fails to advise the Commission that the cellular carriers

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33 Id. at ¶57.

34 As previously explained, even if the Commission were to adopt the narrow view of competition offered by NCRA and the CPUC, it is clear that the cellular market itself is sufficiently competitive in California to reject the CPUC's Petition.

35 The County simply submitted a copy of the comments it filed in the CPUC proceeding.

36 Letter of Thomas H. Bugbee dated September 19, 1994 to William F. Caton submitting the Comments of the County of Los Angeles in CPUC I.93-12-007 at 2.

37 The County claims that regulation is necessary to enhance low rates for the government's safety and emergency uses. However, the County fails to acknowledge that government agencies have already been allocated spectrum by the FCC for public access to frequencies for Local Government Radio Service and Special Emergency Radio Services, through which they can run their own dispatch or SMR network with interconnection.

have established substantially discounted government rate plans[38] and that the City and County of Los Angeles are qualified subscribers to the Los Angeles SMSA Limited Partnership's Government Plan. This plan provides significant discounts over comparable plans. The County saves over 33% on monthly access, 22% to 26% on usage and 66% on service activation. However, while the County maintains that cellular service is too expensive, it has not taken advantage of the Government Contract Plans which would provide additional savings of 14 per cent.[39]

Additionally, as the County concedes, cellular carriers have repeatedly provided phones and air time free of charge during times of crisis.[40] The charitable actions by California cellular carriers have saved the County significant sums. In essence, the County would force California consumers to pay millions in extra regulatory costs in order to achieve savings for government entities which are already available, but not subscribed.

In summary, the proponents of continued regulation have failed to present any credible evidence supporting their claims.

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38 AirTouch Opposition at 46; BACTC Opposition at 18-19, Appx. C.

39 In fact, in the CPUC proceeding, the CPUC's Division of Ratepayer Advocates maintained that the CPUC should not establish special rates for public safety or public agencies. Rather, such expenses should be borne by taxpayers. Division of Ratepayer Advocates Comments in CPUC Investigation 93-12-0007 at 41.

40 Opening Comments of County of Los Angeles in CPUC Investigation I.93-12-007 at 6-7, 11.

Nor is there any such evidence in the record. Their comments focus on protecting inefficient competitors, rather than encouraging competition, no matter what the cost to California consumers.

III. THE RECORD EVIDENCE REFUTES THE CPUC'S CLAIMS.

As the Commission made clear, the CPUC bears the burden of proof in this proceeding. To do so, it is required to present evidence which would justify relief under the Congressionally mandated standard that market conditions fail to protect subscribers from unjust, unreasonable or discriminatory rates. The record demonstrates that the CPUC has failed to meet that standard.

The undisputed evidence shows that California's wireless markets are more competitive than other states.[41] Its favorable wireless demographics has attracted the first facilities' based ESMR competitor.[42] Additionally, two powerful PCS competitors with existing infrastructures, Pacific Bell and Cox Enterprises, are poised to enter the market.[43] Far from need-

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41 CCAC Response at 58; GTE Comment at 16-17; Opposition of U S WEST Cellular of California ("U S WEST Opposition") at 17 (fn 11); AirTouch Opposition at iii, 25-26, 28.

42 GTE Comment at 47-52, Tab A at 13-19; McCaw Opposition, Exh. A at 12-13; AirTouch Opposition, Appx. E at 14-15, 18-21, 24-25.

43 CCAC Response at 60-61; McCaw, Exh. A at 12; AirTouch Opposition at 25-28, 49; see also, e.g., GTE Comment at 46-55, Tab A at 2-5, 11, 13-19; McCaw, Exh. A at 10-12; AirTouch Opposition at 32-36, 39-40, 61, Appx. E at 20-21, 24-25.

ing special protection, California's cellular markets will, if not impeded by regulation, lead the way to expanded competition.

The CPUC has disregarded these undisputed market developments and instead relies on four "findings" regarding market conditions that allegedly warrant continued regulatory intervention: (1) the duopoly market structure; (2) insufficient competitive pressure from ESMR and PCS service providers; (3) relatively high prices for cellular service; and (4) cellular carriers' earnings above those in competitive markets. Even if assumed to be true, the CPUC has simply identified factors resulting from the traditional duopoly structure,[44] which have been observed in all cellular markets nationwide. The "findings" do not demonstrate that California has a special need for state regulation. In fact, the CPUC's attack on cellular's historical duopoly structure has been rendered moot by federal action and cannot support continued state regulation.

In any event, the CPUC's analysis supporting the "findings" is contradicted by the evidence in the record of actual market conditions, sound economic theory and the recent findings of this Commission.

1. **There is no bottleneck in the wireless marketplace.**

The CPUC's finding that cellular service is a bottleneck is contrary to its own prior conclusions as well as those of the

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44 CCAC Response at 108, Appx. A at 23-24; McCaw Opposition at 12-14, 19-22; AirTouch Opposition at iii, 2, 27-28.

Commission.[45] The entrance of Nextel into the California market demonstrates the fallacy of this conclusion. Nextel's comments in this proceeding tout its facilities and its ability to provide a service functionally equivalent to cellular service.[46] If Nextel does not control a "transmission bottleneck" warranting regulation, then cellular service providers cannot control such a bottleneck.

Any concern regarding a bottleneck arising from the duopoly market structure has been eliminated. As Nextel acknowledges

> "[i]t is anticipated . . . that approximately six alternative CMRS providers, including PCS, Cellular and ESMR, ultimately will provide comparable service in any given geographic area."[47]

Under such circumstances there can be no "bottleneck."

2. The CPUC's unduly narrow market definition is not supported by the evidence.

The CPUC placed an artificial restriction on its market definition, limiting the market to cellular service. The CPUC's choice to ignore new competition and create an artificial sub-market is flatly at odds with its own findings and the Merger Guidelines upon which it purportedly relies.[48] Most importantly, this approach ignores both actual market conditions which reflect head-to-head competition with new wireless service

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45 See AirTouch Opposition at 30-31, Appx. E at 22; Second Report and Order at ¶237; CCAC Response at 18, Appx. A at 3; McCaw, Exh. A at 3, 5.

46 Nextel Comments at 4-5.

47 Nextel Comments at 10.

48 AirTouch Opposition at 31-34: CCAC Response at 20, Appx. A at 2, 6-8.

providers[49] and the Commission's finding that "Nextel has successfully begun offering wide-area digital SMR service in competition with cellular carriers in California markets" and that "wide-area SMR operators are in competition with cellular carriers."[50]

Nextel's comments in this proceeding undercut the CPUC's claims that Nextel does not provide effective competition to cellular service. Nextel asserts that its service is the functional equivalent, if not superior, to cellular service:

> "ESMR services, also known as wide area SMR services, provide customers with mobile telephone, paging and dispatch services all in a single handset along with improved clarity and reception and a host of enhanced features . . . [Nextel's] innovations . . . make possible an advanced communications systems [sic] capable of providing mobile telephone service comparable to that currently provided by the cellular industry, as well as private network dispatch, paging and mobile data services."[51]

Nextel's comments further demonstrate that it is currently competing in California:

> "In May of this year, Nextel initiated full commercial operation of its first ESMR service in Los Angeles and soon thereafter expanded into Northern California, including the San Francisco metropolitan area. By the end of 1996, Nextel intends to provide ESMR services to customers in the 50 largest wireless communications markets."[52]

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49 AirTouch Opposition at 25-40, 61, Appx. E at 14-15, 18-21, 24-25; GTE Comment at 17, 45-55, Tab A at 2-5, 11, 13-19; McCaw Opposition, Exh. A at 10-15.

50 Third Report and Order at ¶72 (emphasis added); see also ¶73.

51 Nextel Comments at 5.

52 Nextel Comments at 4.

Nextel has also made clear its intention to compete with cellular service providers on the basis of price.[53] The record in this proceeding demonstrates that Nextel has already injected additional price competition into the California market.[54] In light of this undisputed evidence, the CPUC's limited market definition is inconsistent with the facts, as well as sound economic theory.

Moreover, the CPUC's exclusion of alternative wireless services from its market definition is also contrary to the findings of this Commission. In connection with the AT&T/McCaw transfer application, the FCC recently commented on the competition that the new wireless service providers will offer:

> "The large number of companies that have expressed interest in PCS licenses allays the concern that we might otherwise have with 'potential competition'...Later this year we expect to license several broadband PCS carriers in each area of the country, carriers that we expect will compete with existing cellular carriers....In addition, we believe that the changing technology will enable CMRS licensees to use their licensed spectrum to provide competing services that respond to consumer demand. For example, wide area specialized mobile radio service (SMR) service illustrates the dynamic nature of the CMRS marketplace...Wide-area SMR service could develop as a competitor to the cellular industry, with Nextel beginning to offer service in competition with cellular carriers in California markets."[55]

There is no evidence in this proceeding that contradicts these findings and warrants the placement of cellular service in a separate market.

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53 See Nextel Comments at 15.

54 AirTouch Opposition at 28, 32-33, 49; CCAC Response at 60; GTE Comment at 39-41.

55 In re Applications of Craig O. McCaw and AT&T at ¶41.

3. The CPUC relies on erroneous market share analysis as an indicator of market power.

Having erroneously limited its market definition to cellular service, the CPUC's market share analysis is inevitably flawed.[56] The CPUC erroneously relied upon current market share and excluded the impact of the new entrants. The CPUC relies heavily on the Herfindahl Hirschman Index, despite its limited usefulness in the context of rapidly changing technology and entrance by new competitors. The CPUC's analysis is similarly in error in its focus on resellers to the exclusion of other distribution channels.

In fact, this Commission has noted that market share is not a conclusive measurement of market power:

> "A company's high market share may be inoffensive if the relevant market has many potential entrants--where, if the company attempted to raise price, lower quality, or fail to innovate, a new competitor could enter the market promptly, offer competitive prices and quality and thus frustrate the first company's anticompetitive plan."[57]

Cellular carriers are constrained from raising prices by competing cellular carriers[58], as well as other wireless service providers. As Nextel notes, there are soon to be six potential

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56 AirTouch Opposition at 38-41, Appx. E at 22-24; CCAC Response at 17-28, Tab A at 2-9, Tables 1-4; GTE Comment at 44-45, Att. A at 16-18; McCaw Opposition at 37, Exh. A at 15-19.

57 In re Applications of Craig O. McCaw at ¶51.

58 In connection with the AT&T/McCaw proceeding, the FCC noted that AT&T would be unable to force McCaw to purchase inferior networks because McCaw did not "control the cellular service market (so that it could force its customers to stay with the inferior service provided on AT&T's network)...Of course, the customers could go to McCaw's competitor (such as a BOC), so the financial loss that McCaw would suffer would make the whole venture unprofitable for AT&T/McCaw." In re Application of Craig O. McCaw and AT&T, at ¶52.

competitors in the wireless marketplace. Under such circumstances, current market share, even if accurately measured, is misleading.

4. The CPUC disregarded the clear evidence of price declines and increased choices for California consumers.

The CPUC claims that the price of cellular service in California is too high. It should be noted that rates for cellular service are higher in New York, yet the New York Public Service Commission did not find the prices in that state to be too high.[59]

The CPUC's claim that prices for cellular service have not declined completely disregarded the actual evidence in the market. The cellular carriers have submitted substantial evidence of increasingly aggressive price competition in California markets, resulting in both lower prices and greater consumer choice.[60] The only factor inhibiting more innovative pricing plans and greater discounts is existing CPUC regulation.

5. The CPUC ignored the high level of customer satisfaction.

The CPUC submitted no evidence that customers are dissatisfied with the quality of cellular service in California. To the contrary, the record demonstrates that despite a decline in

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59 See Petition of New York State Public Service Commission in PR Docket No. 94-108, dated August 5, 1994.

60 AirTouch Opposition at 45-50, Appxs. E, H-K; BACTC Opposition at 4-5, 15-24, Appxs. A-D, H; U S WEST Opposition at 5; CCAC Response at 28-39, 64-69, 73, Tab A at 12-15, Table 5, Tab B at 2 (Charts D-J); Bakersfield at 9-10; GTE Comment at 31-36, Attach. A at 6-7, Attach. B; LACTC Response at 10, 16-23, 30-31; McCaw Opposition at 38-40.

prices, cellular subscribers have had the benefit of enhanced service quality and an increasing number of innovative services.[61]

6. The CPUC's claims regarding cellular carriers' earnings conflict with its own findings and sound economic analysis.

The CPUC relies heavily on accounting rates of return which fail to provide an accurate measurement of economic depreciation rates, particularly relevant in an industry with rapid technological change.[62] The CPUC's analysis of capacity utilization, allegedly supporting its theory on earnings, is similarly flawed because it determines capacity based on isolated cell cites and effectively ignores the mobile nature of cellular service.[63]

7. The CPUC cannot refute the evidence that regulation has increased rates.

The record demonstrates that state regulation has increased rates across the nation and the impact has been even greater in California where regulation has been more heavy handed.[64] The

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61 AirTouch Opposition at 46, 52-54; BACTC Opposition at II, 4, Appxs. G, L; CCAC Response at 64, 74, Tab B (Charts A, G-I); Bakersfield at 9-11; GTE Comment at 28-32, 50-51, Attach. A at 6-8; McCaw Opposition at 31-33, 40, Exh. A at 26, 29, Exh. B.

62 AirTouch Opposition at 54-57, Appx. E at 15-18; BACTC Opposition at 25-26; CCAC Response at 39-45, Tab A at 21-22; GTE Comment at 20; LACTC Response at 24-27, 30-31.

63 AirTouch Opposition at 53-54, 57-59; BACTC Opposition at 29-35; CCAC Response at 46-51, Tab A at 27-31; LACTC Response at 32-39; GTE Comment at 21-26; McCaw Opposition, Exh. A at 33-36.

64 AirTouch Opposition at iv, 42-46, 61-72, Appx. E at 3-11, 25-26, Appx. 1, Appx. N; CCAC Response at x-xi, Tab A at 16-17; BACTC Opposition at 35-38, Appx. M; Bakersfield Response at 7-8; GTE Comment at 60-65; McCaw Opposition at 46-47, Exh. A at 40-41; U S WEST Opposition at 5-6.